U.S. Department of Labor

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Issue Date: 05 December 2006

Case No.: 2005-LHC-02617

OWCP No: 04-36366

In the Matter of

R. T.
Claimant

v.

GREENWICH TERMINALS, INC.
Employer

and

EAGLE PACIFIC, INC.
Carrier

Appearances:

Sean E. Quinn, Esquire
For Claimant

Eugene Mattioni, Esquire
For Employer and Carrier

Before: **RALPH A. ROMANO**
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act ("the Act"), 33 U.S.C. § 901 *et seq.* This matter was transferred to the Office of Administrative Law Judges on September 21, 2005, and was assigned to me on October 12, 2005. The formal hearing was initially scheduled for February 2, 2006[1], but due to a joint agreement of both parties, was held on March 9, 2006[2], in Philadelphia, Pennsylvania.[3] At that time each party was

[1] (ALJX 3.)
[2] (ALJX 4; ALJX 5.)
[3] The transcript of the hearing consists of 166 pages and will be cited as "Tr. at --."

given the opportunity to examine witnesses and submit other evidence.[4] Following the formal hearing, the record was left open for the submission of additional evidence for sixty days.[5] (Tr. at 17, 165.) On April 26, 2006 Employer filed a Motion to Extend Post-Trial Evidence until May 31, 2006, which Claimant did not oppose. I issued an order on May 12, 2006 to close the record as of May 31, 2006 and to submit briefs by June 30, 2006.[6] Final briefs were filed by October 25, 2006.

This decision is rendered after careful consideration of the record as a whole, the arguments of the parties, and the applicable law.

STIPULATIONS AND ISSUES

The parties entered into and I find the record supports the following stipulations:

1. Claimant sustained an injury on May 19, 2003.

2. The injury was caused from a 130 pound flipper that broke off and struck Claimant on his hard hat, back of the head, upper back, and neck.

3. The parties are subject to the Act.

4. An employer/employee relationship existed at the time of the injury.

5. Claimant was in the scope of his employment when the injury occurred.

6. Employer received timely notice of injury on May 19, 2003.

7. Notice of controversion was timely filed on three occasions, January 21, 2005, April 13, 2005, and June 28, 2005.

8. An informal conference was held on March 9, 2005.

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[4] I received five ALJ exhibits as "ALJX 1-ALJX 5." (Tr. At 11.) Claimant submitted twenty-four exhibits which I marked and received as "CX 1 - CX 23", rejecting exhibit 24. (Tr. at 12-14.) Employer submitted twenty-five exhibits which I marked and received as "EX 1 - EX 6", "EX 8", and "EX 10 – EX 24", rejecting exhibits 7, 9, and 25. (Tr. at 17-24.) It is important to note that Claimant refers to the surveillance report as EX 8 in his brief, (CB at 16), however, the surveillance report is exhibit 9 instead, which has been rejected. (Tr. at 24.)

[5] Following the hearing in this matter, Claimant submitted six additional exhibits which I have marked and received as "CX 25 – CX 30," respectively. On September 15, 2006 Claimant submitted an additional exhibit which I have marked and received as "CX 31". Post-hearing, Employer submitted 18 additional exhibits which I have marked and received as "EX 27 – EX 31" and "EX 33 – EX 39, rejecting exhibits 26, 32, 40 and 41, respectively. Employer was given 30 days to submit a response to "CX 31" which I have marked and received as "EX 43".

[6] Claimant's brief will be cited as "CB at --." Employer's brief will be cited as "EB at --."

9. Medical benefits have been paid pursuant to § 7 of the Act until the date of controversion, January 11, 2005.

10. Temporary total disability was paid from May 20, 2003 through January 10, 2005, at a rate of $996.54 per week, for a total of 86 weeks and the sum of $85,702.44.[7]

11. Claimant's average weekly wage is $1,715.30.

(Tr. at 5-7).

The issues presented for resolution include:

1. The nature and extent of Claimant's injury, impairment and disability.

2. Claimant's ability to return to work and in the event of a return to work, the capacity in which he is able to return to work.

3. Whether the job offer made by Employer to Claimant was within the specifications and limitations set forth by the physicians that have examined Claimant.

4. Whether Claimant has reached maximum medical improvement ("MMI").

5. Whether suitable alternate employment is available for Claimant.

(ALJX 1; ALJX 2; Tr. at 6-8.)

SUMMARY OF THE EVIDENCE

A. Lay Testimony

Claimant's Testimony

Claimant testified that he was 45 years old, approximately 214 pounds, five feet eight inches tall and worked on the waterfront as a longshoreman since 1986[8]. (Tr. at 30-31, 99.) Since that time, Claimant's job abilities and duties have varied in order to increase his marketability. (Tr. at 32.) He testified that he has worked general cargo, containers, small forklifts, and large top pick machines. (Tr. at 119.) On May 19, 2003, the date of injury, Claimant was working as a "doorway man", unloading cargo from container ships. (Tr. at 30.) Claimant was unloading a container cargo vessel when a flipper[9] came loose and struck the

[7] (EX 24.)

[8] Claimant testified that he has worked for the following companies: Delaware Stevedores, J and H Stevedores, Holt Cargo, Christiana Services, Murphy Marine Services, and his current employer, Greenwich Terminals. (EX 1 at 11-12.)

[9] A flipper is an extension of the spreader and helps guide the spreader onto the container for the crane operator. Flippers are made of solid metal with an average weight of one hundred

Claimant, hitting his head, neck, and upper back, rendering him unconscious. (Tr. at 42-43.) He was subsequently transported, (CX 1), and admitted to Thomas Jefferson University Hospital, (CX 2; CX 3), where he stayed as an in-patient for two and one-half days. (Tr. at 44.)

While being treated at Thomas Jefferson University Hospital, Claimant was placed in a body cast and informed that he had multiple spinal fractures located in the upper part of his spine. (EX 15-16; EX 18; EX 23; Tr. at 45.) He was also treated for an ankle injury by Dr. Vitanzo. (CX 6; EX 13.) Claimant was thereafter transferred to Magee Rehabilitation Center where he was treated for approximately nine days. (CX 5; EX 17; Tr. at 46.) Upon his release, Claimant was informed that he would need around the clock care, which was provided by his mother during the next six months. (Tr. at 49.) During this time Claimant was prescribed several pain medications, anti-inflammatory, and Lodaderm patches. (Tr. at 50.) He testified on cross-examination that he is currently taking Flexeril, Tramadol, and a third pain medication. In addition to the medication, Claimant is currently using a TENS unit to relieve pain. (Tr. at 124-125.)

Claimant began treatment with Dr. Vacarro, an orthopedic surgeon with the Rothman Institute, at the request of Louise Kaplan, Claimant's case manager. (Tr. at 52.) In addition, Dr. Vacarro referred him to attend physical therapy at The Center for Aquatic Rehabilitation ("AquaHab") six months after the injury occurred. (CX 4; Tr. at 54-55.) He has continued therapy with them continuously since that time. (Tr. at 55.) Ms. Kaplan also sent him to see Dr. Evan Frank, a pain management specialist. (CX 9; EX 20; Tr. at 56.) He has continued treatment with Dr. Frank approximately every four to five months since that time. (Tr. at 57-58.)

Claimant switched orthopedic surgeons and began treatment with the physician of his choice, Dr. Roy Lefkoe, (Tr. at 56), who was recommended by several of his coworkers. (Tr. at 141.) He has continued regular examinations and treatments at least once a month with Dr. Lefkoe. Several MRI's have been taken, Claimant continues physical therapy, and Dr. Lefkoe prescribes his medications. (Tr. at 57.) In addition to his treating physicians, Claimant was examined upon request of Employer by Dr. Richard Mandel. (Tr. at 60.) Dr. Mandel sent Claimant to attend a functional capacity evaluation performed by Deborah Shore. (Tr. at 85.) Claimant stated that he performed the activities to the best of his ability believing that he had done well. (Tr. at 86.) He also testified that he put forth his best effort when dealing with all of the various physicians. (Tr. at 121.)

Claimant received a letter in January of 2005 from Employer requesting him to return to work. The letter informed him that there were jobs available for him at the Packer Avenue Marine Terminal and to report to work at 8:00 a.m. (Tr. at 61.) In response to this letter, he met with John Burleson, the assistant terminal manager, to discuss the available positions. Mr. Burleson offered him two positions during this meeting: the top pick operator position and the yard horse truck position. (Tr. at 62.)

Claimant explained that the duties of a top pick operator include driving a very heavy vehicle to load and unload containers from the ground level onto trucks or other locations.

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thirty pounds. (Tr. at 43.)

Operating this vehicle involves simultaneously operating a steering wheel with the left hand, a clutch, brake, and gas pedal with the feet, and levers with the right hand. (Tr. at 35, 38, 40.) In order to get in the cab of the vehicle, one must climb two flights of stairs, one from the ground to the first level, similar to a ladder, and steep stairs into the cockpit of the vehicle. (Tr. at 36.) Claimant testified that the responsibilities of a top pick operator are very demanding, requiring a numerous amount of turning and twisting of your neck and trunk in order to see where you are going. (Tr. at 39-40.)

Employer has presented a video demonstration of the top pick operator position. (EX 8.) Although the demonstration does not misrepresent the position, Claimant testified that the duties, responsibilities, and physical requirements of a top pick operator were not accurately depicted. (Tr. at 87, 152, 161.) Based on his experience, a top pick operator does not have as much time to sit around as shown in the video. (Tr. at 87.) The video did not accurately reflect the twisting, turning, head movements, and simultaneous movements that are required to operate the machine. (Tr. at 88.) Furthermore, Claimant testified that the video did not show the operator climbing in and out of the vehicle. (Tr. at 88.) The video only demonstrated the top pick operator job with one container however Claimant explained that the job usually entails lifting three containers, making the job more difficult than depicted in the video. (Tr. at 157-158, 160.) The more containers being stacked, the more looking up is involved, which Claimant testified is difficult for him. (Tr. at 162.) Claimant also explained that you often have to turn and look behind when reversing without solely relying on the mirrors as depicted in the video. (Tr. at 163.) Claimant also testified that the job duties of a yard horse operator were more physically demanding than the top pick operator position. (Tr. at 66, 75.) The "hustle truck"[10] moves containers in the yard and to the ships. This position involves a lot of bending and being thrown around because you slam the containers to make a connection. In addition, the pot holes and dips cause the vehicle to bump around. (Tr. at 65-66.)

Claimant testified that he informed Mr. Burleson that he did not feel physically able to handle these jobs because he was still limited in his ability to twist from side to side, look up and down, look side to side, sit for a long period of time, and climb in and out of the top pick vehicle on a regular basis without pain. (Tr. at 70-71.) During this meeting, they discussed the crane operator's position and that additional training is needed for that position. (Tr. at 63-64.) Claimant testified that he felt he could perform that position because it was less physically demanding.[11] (Tr. at 97-98, 143.) Claimant testified that a position as crane operator was not offered to him at that time nor was he offered any other positions during that meeting. (Tr. at 63-64, 142.)

Claimant's workers' compensation benefits were thereafter terminated on January 11, 2005. (CX 22; CX 23; EX 24; Tr. at 72-73.) As a result, Claimant attempted to return to work on

10 The hustle truck is the vehicle used in the yard horse operator position. Claimant also refers to this vehicle as a "jockey truck". (Tr. at 65.)

11 Claimant testified the crane machine is stationary with no driving involved. There is no twisting and turning required to operate the equipment. Claimant would not have to climb any stairs because the crane machine has elevators to enter the cab. (Tr. at 97-98.)

April 4, 2005 as a top pick operator. (Tr. at 73.) Claimant explained that his physician, Dr. Lefkoe, advised against returning to work; however, he did so against that advice because he needed to earn a living and wanted to return to the employment he had done for so many years. (Tr. at 74.) Claimant attempted to operate the top pick vehicle but was unable due to considerable pain in his neck and mid-back. He explained that he put forth a good faith effort but had experienced difficulties caused by turning the steering wheel, using the levers, and applying the feet pedals simultaneously. (Tr. at 76.) He was then transported to Methodist Hospital for treatment and was informed that he had once again aggravated the nerves in his neck. He was instructed to wear a neck brace for 10 days and discharged to see Dr. Lefkoe. (CX 12; CX 13; Tr. at 77.) In addition, Claimant was also given a prescription for Ibuprofen and Flexeril to control the pain and inflammation. (Tr. at 78.) Claimant testified that he has not been offered additional positions and has not returned to work with Employer since that incident. (Tr. at 79.)

After his failed attempt to return to work, Claimant began vocational training with the Department of Labor under the supervision of vocational rehabilitation specialist, Dr. Robert Chaiken, (Tr. at 79), discussed in detail below. Claimant explained that he is currently still in pain, experiencing headaches, stress, constant neck pain, extreme pain in his left shoulder, mild pain in his right shoulder, and shooting pains from the middle of his back to his shoulders. (Tr. at 89-91, 95.) He is still limited in his ability to turn his head from side to side and up and down. (Tr. at 89-90.) Furthermore, Claimant testified that he is continuing to take medication to control the pain that constantly affects him. (Tr. at 91.) He also has a slight numbing sensation in his hands when required to grip something for a long period of time. (Tr. at 92.) In addition, he experiences a shooting pain from his buttocks to the bottom of his calf. (Tr. at 93-94.) He is unable to twist at the trunk and has a consistent feeling of pain in his lower back. (Tr. at 94.) Furthermore, Claimant testified that he could only sit for approximately four hours at a time. (EX 1 at 73.)

Claimant explained on cross-examination that he began driving his Chevy pickup truck and his wife's Mercury Mountaineer approximately two months after he was injured. (Tr. at 102, 119.) He testified that he drove on average an hour and one-half each day running various errands. (Tr. at 103.) Claimant drives to the rehabilitation center, where he is continuing his rehabilitation treatment, three to four times a week and testified that he exercises for approximately two hours each time. He implements aerobic, weight training and pool exercise into his rehabilitation. (Tr. at 109-114.) Claimant also stated that he can walk up and down the stairs at his home a few times each day. (EX1 at 77.)

John Burleson

Mr. Burleson has been the General Manager of Greenwich Terminals for approximately four years. (CX26 at 6; EX28 at 6.) He testified on April 18, 2006. (CX 26 at 1; EX 28 at 1.) He was notified of Claimant's accident by phone on the evening of May 19, 2003. (CX 26 at 15; EX 28 at 15.) Some time after the accident Mr. Burleson took Claimant to lunch to see how he was doing and let him know they had his best interests in mind. (CX 26 at 18-19; EX 28 at 18-19.) He testified that he does not remember discussing whether Claimant would be able to return to work during that lunch. (CX 26 at 20; EX 28 at 20.)

Mr. Burleson explained that after receiving a physical capabilities evaluation, detailing Claimant's physical work restrictions, a joint decision was made to send Claimant a return to work letter on December 22, 2004. (CX26 at 21, 35, B1; EX28 at 21, 35, B1.) This letter indicated that this decision was based on the November 21, 2003 evaluation performed by Dr. Vacarro. (CX 26 at 41, 108, B1; EX 28 at 41, 108, B1.) Mr. Burleson proceeded to explain that he refers to the physician's evaluation of physical abilities when deciding which positions to offer and matches them with a job that meets those abilities. (CX 26 at 47; EX 28 at 47.)

Claimant reported to work on January 10, 2005 and met with Mr. Burleson in his office. He testified that he specifically offered Claimant the top pick operator position and the yard horse position at that time. (CX 26 at 49, 79-81; EX 28 at 49, 79-81.) He stated that he felt they were the most suitable positions and the restrictions provided by Dr. Vacarro were consistent with the duties of a top pick operator. (CX 26 at 49, 148; EX 28 at 49, 148.) They also discussed the deckman positions and he thought that it was understood that they were available as well, although he never expressly offered them. (CX 26 at 49, 76, 89; EX 28 at 49, 76, 89.) Mr. Burleson did not offer Claimant any hold positions, doorway man positions, checker positions, or crane positions because he either did not have the training needed or he was physically incapable. (CX 26 at 51, 65, 81, 84-86; EX 28 at 51, 65, 81, 84-86.) Mr. Burleson testified that they agreed that Claimant would decide by the end of the week whether he could return to work one of the positions offered. (CX 26 at 69; EX 28 at 69.) He received a phone call from Claimant on January 17, 2005 informing him that he would be unable to return to work at that time. (CX 26 at 76; EX 28 at 76.) Claimant's benefits were then controverted effective January 11, 2005. (CX 22; CX 23; CX 26 at 76; EX 24; EX 28 at 76.)

Mr. Burleson testified that Claimant returned to work on April 4, 2005. (CX 26 at 29; EX 28 at 29.) He was assigned to operate a 1050 top pick machine although there were four 955 machine's available that day. (CX 26 at 29, 97, 106; EX 28 at 29, 97, 106.) He testified that the newer 955 machines have features which make the use of the machine much easier.[12] (CX 26 at 96-100; EX 28 at 96-100.) He was unsure why Claimant was given the old machine instead of the 955. He explained that the 1050 machine does not have the cab tilt function of the new machines and in order to stack three containers high you have to tilt the head back to see properly. (CX 26 at 96-97; EX 28 at 96-97.)

Mr. Burleson reviewed the videotape demonstration, (EX 8), and testified that it is an accurate depiction of the top pick operator position. (CX 26 at 138; EX 28 at 138.) He stated that the video depicts an operator going in and out of the stacks and stacking two containers high, although it is normal practice to stack up to three containers high. (CX 26 at 140; EX 28 at 140.) He explained that the top pick machine has a lever/joystick on the right side and when the machine is being operated the right hand must be on the lever. The only time that the right hand is free to steer is when the operator is driving from one point to another. (CX 26 at 100; EX 28 at 100.) He also testified that as a safety measure, it is prudent and appropriate to turn around to look over your shoulder when backing up, instead of solely relying on the mirrors. (CX 26 at

[12] These new features include a joystick lever which reduces some of the simultaneous hand movements, a cab tilt which eliminates having to twist your head upward when stacking three or more containers, and video monitors to make reversing safer and easier.

102-103; EX 28 at 102-103.) He testified that he does not feel the top pick operator position is physically demanding and does not require strength to steer the machine or climb into it. (CX 26 at 164; EX 28 at 164.) He also stated that there is usually downtime and an operator is sitting for approximately five and one-half hours operating the machine in an average workday. (CX 26 at 152; EX 28 at 152.) He stated that on April 4, 2005, Claimant came into his office after he again incurred an injury to file an accident report. (CX 26 at 120; EX 28 at 120.) At no time since April 4, 2005 has the Employer offered any other positions to the Claimant. (CX 26 at 131; EX 28 at 131.)

Robert Kermon

Mr. Kermon testified on April 18, 2006. (CX 27 at 1; EX 29 at 1.) He was employed at Greenwich Terminals as Director of Safety and Loss Control for approximately three years ending on April 1, 2005. (CX27 at 10; EX29 at 10.) Mr. Kermon testified that he was present when the video demonstration was filmed on June 7, 2005. (CX 27 at 25; EX 29 at 35.) He explained that filming was done randomly, however he does not know whether the final version was edited because he never saw the raw footage. (CX 27 at 37; EX 29 at 37.)

B. Medical Evidence

Dr. Alexander R. Vaccaro

Dr. Vaccaro is a Board certified orthopedic surgeon since July of 1995, (EX 3 at V1), and testified on May 22, 2006. (EX 3 at 4.) Dr. Vacarro first treated Claimant on May 20, 2003 at Thomas Jefferson University Hospital. He testified that Claimant was diagnosed with fractures of the C7, T1, T11, T12, and L1 vertebrae and was fitted with a cervical collar. (CX 4; EX 3 at 7; EX 5.) The cervical collar was removed on August 5, 2003 at which time the doctor recommended Claimant undergo rehabilitative treatment with AquaHab. (CX 7; EX 5.) A functional capacity evaluation was performed on November 3, 2003 by Thomas Cantwell and Stephanie Guie, physical therapists at AquaHab. (CX 7; EX 3 at 8; EX 12.) The report provided that Claimant gave a self-limited effort, with 50 of 53 consistency measures. (CX 7; EX 12.) However, the doctor explained that this indicates that Claimant probably gave his best effort, but was most likely tired. (EX 3 at 31.) In addition, the doctor testified that he never noticed a lack of effort from Claimant and it is hard to objectively measure pain in an evaluation because of the individual, subjective nature of pain. (EX 3 at 23, 31-32.)

After receiving the report from AquaHab, Dr. Vacarro filled out an evaluation of physical abilities on November 23, 2003. He placed the following restrictions on Claimant's work capacity: light pushing and pulling; medium lifting; occasional[13] reaching, stooping, crouching, kneeling, crawling, climbing, balancing, handling, and fingering; and frequent[14] standing, sitting, and stooping. (EX 3 at 14-15; EX 5.) The doctor explained that these restrictions were consistent with his personal observations and examinations of Claimant. (EX 3 at 16-17.) He released Claimant to work in a light duty capacity at that time. (EX 3 at 17.) In order to determine

[13] Occasionally is characterized as 1/3 of the time. (EX 5.)

[14] Frequently is characterized as 1/3 to 2/3 of the time. (EX 5.)

whether a patient should be cleared for work the doctor testified that he considers the functional capacity evaluation, patient's motivation, the patient's abilities, and response to recommendations. (EX 3 at 26.) The doctor further testified that he did not have knowledge as to whether any positions were ever made available to Claimant. (EX 3 at 25.)

Dr. Vacarro determined that Claimant had reached MMI by his next and final evaluation on March 9, 2004, meaning his condition would most likely not improve. (CX 4; EX 3 at 18-19; EX 5.) At that time Dr. Vacarro felt that Claimant should continue his pain management with Dr. Frank and his physical therapy with AquaHab. (EX 3 at 26.) He explained that Claimant was attempting to return to light duty work, but found it difficult because he was experiencing chest and parascapular discomfort. (EX 3 at 18, 20.) He indicated that Claimant was willing and eager to get back to work and appeared to be motivated during his treatment. (EX3 at 20-21, 23.)

Dr. Evan D. Frank

Dr. Frank is a pain specialist at the Graduate Pain Center. He began treating Claimant for pain resulting from his May 19, 2003 injury on November 24, 2003. The doctor has treated Claimant approximately every three to four months since that time for pain.[15] The doctor's prognosis of Claimant's condition remained fairly consistent, continuing his pain medication at each visit. On April 28, 2004, Dr. Frank concluded that Claimant had reached MMI and little treatment could be done except to maintain the pain. (CX 9; EX 20.)

Dr. Richard J. Mandel

Dr. Mandel is a Board certified orthopedic surgeon since 1983, (EX 2 at 6), and testified on January 24, 2006. (EX 2 at 4.) Dr. Mandel examined Claimant at the request of the Employer, at no time providing Claimant with any recommendations or treatment options. (EX 2 at 26, 34.) He first saw Claimant on March 16, 2004 where he performed a physical examination and reviewed Claimant's medical records, including Dr. Vaccarro's, Dr. Frank's, and AquaHab's records. (CX 15; EX 2 at 7, 12; EX 4.) He also reviewed the November 3, 2003 functional capacity evaluation performed by AquaHab. (CX 7; EX 2 at 12; EX 12.) After his evaluation, Dr. Mandel concluded that Claimant had fractures of the spinous process C7 and T1 and compression fractures of the thoracic spine T1, T8, T12, and possibly T9 and T11. (CX 15; EX 2 at 13; EX 4.) He then determined that Claimant was capable of light duty work at that time.[16] (CX 15; EX 2 at 13; EX 4.) After this initial evaluation, Dr. Mandel placed the following restrictions on the Claimant's work capacity: lifting up to 20 pounds (30 occasionally); occasionally bending at the waist, climbing, crawling, and kneeling; no repetitive pushing or pulling; and no reaching above his shoulders. (CX 15; EX 2 at 14; EX 4.)

[15] His reports reflect that Claimant visited his office on November 24, 2003, February 4, 2004, April 28, 2004, August 6, 2004, October 18, 2004, April 18, 2005, and October 18, 2005. (CX 9; EX 20.)

[16] This determination was based on the 11/3/2003 functional capacity evaluation, a physical examination, medical records, diagnostic studies, and Dr. Mandel's experience evaluating Longshoreman injuries. (EX 2 at 53, 58.)

Dr. Mandel evaluated Claimant again on September 1, 2004. Claimant informed him that he was still unable to do certain tasks that were part of his job, such as climbing ladders and heavy lifting. Claimants primary complaint during this evaluation was upper back pain, neck soreness, and lower back stiffness, which increased with heavy activity. (CX 15; EX 2 at 14-15; EX 4.) Dr. Mandel performed a physical examination and also reviewed Claimant's medical records from Dr. Frank and Dr. Lefkoe. (CX 15; EX 4.) Dr. Mandel agreed with Dr. Frank that Claimant had reached MMI and would remain at the same level of symptoms and functionality. (CX 15; EX 2 at 17; EX 4.) He determined that Claimant was capable of light to moderate duty work at that time. (CX 15; EX 2 at 18; EX 4.)

The doctor completed a physical capability checklist on November 10, 2004, based on a functional capacity evaluation performed by Deborah Shore, a physical therapist. (CX 11; CX 15; EX 2 at 18; EX 4; EX 22.) The doctor testified that the medical restrictions he set at this time replaced the evaluation done on March 16, 2004. The new restrictions included: no repetitive pushing and pulling; occasional climbing, crawling, and reaching above shoulders; and lifting and carrying larger amounts of weight. Based on this functional capacity evaluation, Dr. Mandel determined that Claimant was capable of light duty work. (CX 15; EX 2 at 18; EX 4.)

Dr. Mandel also evaluated Claimant on April 18, 2005 after his unsuccessful attempt to return to work. Claimant explained that he had tried to return to work, but had experienced increased neck pain and was taken to the Emergency Room at Methodist Hospital. (CX 15; EX 2 at 19; EX 4.) After discussing this position,[17] where Claimant described the duties of a top pick operator, Dr. Mandel assessed that Claimant could not perform that position. (EX 2 at 21-22.) However, his conclusion was modified after he watched the video demonstration of the top pick operator position, asserting that Claimant was capable of performing as a top pick operator. (CX 15; EX 2 at 22; EX 4; EX 8.) His determination was based on the video, Claimant's history, and his expertise in Orthopedics. (EX 2 at 23.) The doctor testified that his restrictions were still light duty work, but that the top pick operator position is consistent with those restrictions. (EX 2 at 25.)

Dr. Mandel made this determination by assuming that the Claimant would be sitting for approximately seven to seven and one-half hours, however his restrictions limited Claimant to only sitting frequently. (EX 2 at 61, 81.) He stated that his conclusions were still consistent with the restrictions because he would be driving during that time instead of just sitting. (EX 2 at 82, 88.) In addition, the doctor explained that there are some inconsistencies with the job description of a top pick operator and the November 10, 2004 restrictions he provided. He attempted to explain these inconsistencies with his assessment that Claimant could operate the top pick machine by stating that "there was an inaccuracy" in the restrictions. (EX 2 at 87.) Dr. Mandel's opinion had not changed by June 19, 2006 and he maintained that Claimant's functional capabilities were consistent with the duties of a top pick operator. (EX 36.)

[17] This was the only Longshoreman position Dr. Mandel discussed with the Claimant. (EX 2 at 41.)

Dr. Roy T. Lefkoe

Dr. Lefkoe is a Board-certified orthopedic surgeon since September of 1978, (CX 25 at 7; EX 35 at 7), and testified on May 26, 2006. (CX 25 at 4; EX 35 at 4.) He became Claimant's treating physician on June 24, 2004. (EX 35 at 13.) After performing an initial evaluation of Claimant on that date, Dr. Lefkoe diagnosed him with the following injuries: contusion and sprain of the cervical and thoracic spine, C7 fracture of the spinous process, T1 fracture of the spinous process, anterior wedge compression fractures of T7, T8, and L1 of the vertebrae, and a sprain of the right ankle. This diagnosis was made after taking a history from Claimant, inquiring as to Claimant's present complaints, reviewing medical records, and performing a physical examination. (CX 10; CX 25 at 15-17; EX 21; EX 35 at 15-17.) Based on that diagnosis the doctor recommended that Claimant continue rehabilitative treatment with AquaHab and continue to take his medications to control the pain. Dr. Lefkoe also indicated that Claimant could return to work with light duty restrictions, which would be determined by a functional capacity evaluation. (CX 10; CX 25 at 20-21; EX 21; EX 35 at 20-21.)

Since that date he has provided regular treatment of Claimant for the injuries sustained on May 19, 2003. Claimant has returned to Dr. Lefkoe's office for follow up care approximately every four to six weeks.[18] The doctor performed a functional capacity evaluation on December 14, 2004. The evaluation provided the following limitations: He could sit, walk and stand up to four hours each day, he could not reach above his head or left shoulder, he could not twist, he could not operate a forklift, he could push and pull up to 50 pounds, he could lift up to 30 pounds for four hours, he could squat and kneel occasionally, he could not do any climbing, and he should be given frequent breaks at will. (CX 10; EX 21.) As the doctor's diagnosis and recommendations remained unchanged, Dr. Lefkoe determined that those limitations should remain permanent. He testified that these restrictions are important because it would greatly increase Claimant's pain to perform beyond those activities, his tolerance would become decreased, and he would be unable to perform without frequent breaks. (CX 25 at 28-30; EX 35 at 28-30.)

The doctor evaluated Claimant on April 8, 2005, four days after his return to work, and determined that he had a recurrence of injuries. He explained that he had not previously discussed the top pick operator position with Claimant and had not released him to work that specific job. (EX 35 at 33-34; CX 25 at 33-34.) The doctor explained that he would not clear Claimant for any position which required, as the top pick operator does, climbing frequently, continuous sitting, use of hand levers and feet pedals simultaneously, twisting of the trunk and looking upwards because of the pain it will cause while aggravating his injuries. (CX 25 at 49-51, 55, 59, 68; EX 35 at 49-51, 55, 59, 68.) The doctor stated that Claimant would be able to climb the top pick operator stairs if he did so slowly and carefully, however doing so four or five

[18] Claimant returned to Dr. Lefkoe's office for treatment on August 10, 2004, September 21, 2004, November 3, 2004, December 14, 2004, February 8, 2005, March 29, 2005, April 8, 2005, April 20, 2005, May 18, 2005, June 28, 2005, August 12, 2005, September 27, 2005, November 21, 2005, January 23, 2006, March 21, 2006, and May 23, 2006. (CX 10; EX 21; CX 25 at 21-23, 25, 33, 35, 38-40, 43, 46, 61, 65; EX 35 at 21-23, 25, 33, 35, 38-40, 43, 46, 61, 65.)

times in one shift would most likely aggravate his pain. (CX 25 at 101-102; 125; EX 35 at 101-102; 125.)

He further explained that a crane operator would be consistent with his restrictions and he would most likely clear Claimant to work that position. (CX 25 at 68; EX 35 at 68.) The doctor testified that he would probably not clear Claimant for a cargo position because the description calls for bending and turning the head frequently. (EX 35 at 132.) However, he did indicate that he would need more information for both that position and a deckman container operation position to decide with certainty whether he would release him to work those positions. (EX 35 at 138-140.) Dr. Lefkoe testified that he had no knowledge of Claimant being offered a position consistent with the restrictions set forth by him. (CX 35 at 41; EX 35 at 41.) In addition, he stated that there are many jobs outside the waterfront that would be consistent with the restrictions set forth, but to his knowledge Claimant had not received any job offers. (EX 35 at 129-130.)

Although Claimant's prognosis remained unchanged, the doctor found tenderness and tightness varying in his neck and upper back with each visit. (EX 35 at 23-25, 33-35, 41-43, 61-65, 69; CX 25 at 23-25, 33-35, 41-43, 61-65, 69.) An MRI, performed on November 26, 2005, showed his condition was worsening due to his spinal fractures. Dr. Lefkoe made some additional diagnoses based on the MRI results, including an L4-5 and L5-S1 degenerative disc disease and bulging disk. (CX 10; CX 25 at 62-63; EX 21; EX 35 at 62-63; EX 37.) Dr. Lefkoe also stated that the last time he evaluated Claimant he was still experiencing tightness and taughtness and limited range of motion. (CX 25 at 69; EX 35 at 69.)

Dr. Lefkoe testified that his conclusions regarding Claimant's injuries are that they are permanent and that Claimant will continue to have pain and permanent limitations. (CX 10; CX 25 at 60, 71; EX 21; EX 35 at 60, 71.) He stated that Claimant showed no evidence of exaggerating symptoms or pain during his treatment and has always given his best effort. (EX 35 at 120, 141-142.) He explained that Claimant's degenerative disease will most likely progress and he will require ongoing use of medication to control his pain. (CX 25 at 72; EX 35 at 72.) He further testified that continuing Claimant's treatment is reasonable and medically necessary to maintain his level of pain management although his condition will not improve. Dr. Lefkoe reported on January 16, 2006 that he agreed with Dr. Frank's assessment that Claimant had reached MMI. (CX 10; CX 25 at 59-60, 73; EX 21; EX 35 at 59-60, 73.)

C. Vocational Evidence

Dr. Robert Chaiken

Claimant began vocational training with Dr. Robert Chaiken, a vocational rehabilitation specialist for the Department of Labor, on April 14, 2005. (CX 31; Tr. at 79.) A job profile was created for Claimant after Dr. Chaiken conducted an aptitude evaluation on June 15, 2005. (CX 31; Tr. at 80.) Dr. Chaiken recommended the following suitable alternate employment:

Date Available	Job Title	Company	Hours per Week	Hourly Rate/ Salary	Location	Duties/ Requirements
Not specified	Security and Safety Officer	Greater Philadelphia Health Action, Inc.	40	Not specified	Philadelphia, PA	Lock/unlock doors, ensure building is secure at all times, keep accurate records of activities for record keeping and inspection purposes, remove all surrounding debris to ensure safety.
Not specified	Dispatcher/ Call Taker	Transportation Service	Full-time	Not specified	Philadelphia, PA	Dispatch, customer service, knowledge of Philadelphia area, and two-way radio experience.
Not specified	Dispatcher	Del Monte	Full-time night shift	Not specified	Philadelphia, PA	Communication, various dispatch duties, and data entry.
08/15/05	HVAC Mechanic	City of Philadelphia	Not specified	$36,326 – $39,964	Philadelphia, PA	Maintenance, repair, and operation of heating, ventilation, air conditioning, and/or refrigeration systems. Routine inspections on equipment to detect and repair malfunctions. Engage in preventive maintenance and monitor and regulate equipment operations as necessary.
Not specified	Shipping and Receiving Clerk	Material Sciences	Full-time	$12.00 per hour	New Hope, PA	Handles all inbound shipments of materials and related paperwork. Schedules and receives all inbound trucks, shipments, and materials. Obtains freight rates and approves freight bills as required. Enters inventory and assists with cycle counting.

Not specified	Mailroom Clerk	Reimbursement Technologies, Inc.	Full-time	$8.50 per hour	Conshohocken, PA	Performing criminal, verification of education, and past employment background checks.

(CX 30; CX 31; Tr. at 80.)

The jobs recommended involved little to no physical demands. (Tr. at 80.) Dr. Chaiken assisted Claimant in drafting a resume and suggested he include a functional capacity evaluation, provided by Dr. Lefkoe, indicating his physical limitations with each application. (Tr. at 81.) Claimant testified that he submitted six job applications to various employers such as Greater Media Health Organization, Philadelphia City, HVAC, and security positions; however he was unsuccessful in obtaining employment, receiving no job offers. (Tr. at 82-83.) Claimant met with Dr. Chaiken after attempting to secure employment and did not receive additional vocational rehabilitation at that time. Dr. Chaiken closed Claimant's file after meeting with Claimant following the failed attempts at obtaining employment, although he did note that Claimant cooperated fully throughout the placement process. (CX 31; Tr. at 84.)

Sonya Mocarski

Sonya Mocarski is a certified Vocational Consultant with Diversified Rehabilitation and Consulting, Inc. (EX 31.) She prepared a vocational evaluation and labor market study upon the Employer's request on June 10, 2004 and June 22, 2005. (EX 6.) After performing a vocational assessment Ms. Mocarski recommended the following suitable alternate employment:

Date Available	**Job Title**	**Company**	**Hours per Week**	**Hourly Rate/ Salary**	**Location**	**Duties/ Requirements**
3/14/04	Fork Lift Operator	New Century Transportation	Not specified	$14.00 – $18.00 per hour	Westhampton, NJ	Operate a fork lift to move palletized freight in a warehouse.
3/28/04	Crane Operator	American Auto Salvage	Not specified	$15.00 per hour	Mays Landing, NJ	Operate a crane in a salvage yard. Occasionally moving articles out of the way.
4/18/04	Fork Lift Operator	Jevic Transportation, Inc.	Not specified	$15.90 – $17.00 per hour	Delanco, NJ	Operate a fork lift to load outbound trailers and unload inbound trailers.
6/13/04	Heavy Equipment Operator	Blenheim Construction	Not specified	$21.12 per hour	Laurel Springs, NJ	Operate equipment such as top loader or back hoe.
6/20/04, 6/5/05, and 6/20/05	Fork Lift Operator	U.S. Components	Not specified	$12.00 – $13.98 per hour	Berlin, NJ and Morrisville, PA	Operate a fork lift to lift lumber. Some lifting may be necessary.
4/03/05	Fork Lift Driver	Hobart West Solutions	Not specified	$11.00 – $14.00 per hour	Burlington, NJ	Fork lift driving at a warehouse setting. Some possible lifting.

4/10/05	Order Selector	Delaware Valley Wholesale Florist	Not specified	$11.00 per hour	Sewell, NJ	Select fresh flowers to fill customer's orders.
4/10/05	Order Filler	Amerisource Bergen	Not specified	$13.85 per hour	Thorofare, NJ	Work in a warehouse environment filling orders.
6/12/05	Para Transit Driver	Laidlaw Transit Services	Not specified	$11.40 per hour	Pennsauken, NJ	Drive a para-transit van with passengers. Guide wheel chairs onto the vehicle.
6/20/05	Driver/ Messenger	CD & L Park Avenue	Not specified	$12.50 – $15.00 per hour	Hainsport and Freehold, NJ	Messenger to banks. Pick up and drop off envelopes and small packages.
6/20/05	Fork Lift Driver	Accu Staffing	Temporary	$12.50 per hour	Pennsauken, NJ	Drive fork lift in warehouse setting.
5/08/05 and 6/20/05	Fork Lift Driver	Ball Plastic Container Operations	Not specified	$13.71 – $15.71 per hour	Cinnaminson, NJ	Drive fork lift in plastic manufacturing plant.

(EX 6.)

Ms. Mocarski based her report on the job analysis, records of Claimant's medical treatment, and current medical status. In the initial report that she completed on June 10, 2004 Ms. Mocarski relied on Drs. Vacarro and Mandel's determinations regarding the Claimant's functional capacity. Furthermore, when she evaluated Claimant's vocational capacity on June 22, 2005 she also reviewed reports from Dr. Lefkoe. During her review she looked at the job description of a top pick operator and concluded that this position is consistent with Dr. Mandel's restrictions he set forth in his November 10, 2004 evaluation. However, she was unable to compare the top pick operator job with the permanent restrictions Dr. Lefkoe placed on Claimant because she was not provided with a detailed list of those restrictions. (EX 6.)

Ms. Mocarski submitted a follow up report on May 24, 2006. Based on updated reports from AquaHab, Dr. Lefkoe, Dr. Mandel, and Claimant's testimony, she prepared a labor market survey indicating examples of the job types that would be suited for Claimant. (EX 30.) Ms. Mocarski also submitted a report on June 21, 2006 after reviewing the top pick operator position. She stated that based on the restrictions placed by Dr. Vaccaro, Dr. Mandel, or Dr. Lefkoe the position is consistent with the Claimant's capabilities. She further indicates that she does not consider Claimant's testimony describing the duties of a top pick operator to be consistent with the description provided her. (EX42.)

Deborah Shore

Ms. Shore submitted a report on May 30, 2006, concluding that Claimant would be capable of performing the duties of a top pick operator. She based this opinion on a job description as well as Claimant's testimony. (EX 34.)

Thomas Cantwell

Mr. Cantwell, a physical therapist for AquaHab, submitted a report dated May 22, 2006. He reviewed the job description of the top pick operator position, the video demonstration, and Mr. Burleson's testimony. He compared the job description with the functional capacity evaluation performed on November 3, 2003. Mr. Cantwell concluded that Claimant is able to meet the demands of the top pick operator position as well as Deckman positions. He did not base his opinion on "any change in medical status since that time." (EX 33.)

DISCUSSION

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiner. *Avondale Shipyards, Inc. v. Kennel,* 914 F.2d 88, 91 (5th Cir. 1988); *Atl. Marine, Inc. And Hartford Accident & Indem. Co. v. Bruce,* 661 F.2d 898, 900 (5th Cir. 1981); *Banks v. Chicago Grain Trimmers Ass'n, Inc.,* 390 U.S. 459, 467, *reh'g denied,* 391 U.S. 929 (1968).

It has been consistently held that the Act must be construed liberally in favor of the claimant. *Voris v. Eikel,* 346 U.S. 328, 333 (1953); *J.V. Vozzolo, Inc. v. Britton,* 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies that the proponent of a rule or position has the burden of proof. *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267 (1994), *aff'g* 990 F.2d 730 (3d Cir. 1993).

1. Nature and Extent of Claimant's Disability

To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his usual employment due to the injury. *Elliott v. C & P Tel. Co.,* 16 BRBS 89 (1984). *See, e.g., Manigualt v. Stevens Shipping Co.,* 22 BRBS 332 (1989) (employee required lighter duty which did not require the use of his right hand grip, and thus could not resume his former employment of holdman). The judge must compare the claimant's medical records with the specific requirements of his usual employment. *Curit v. Bath Iron Works Corp.,* 22 BRBS 100 (1988). If the claimant establishes a *prima facie* case, the burden shifts to the employer, who must then show that suitable alternate employment exists. *Clophus v. Amoco Prod. Co.,* 21 BRBS 261 (1988); *Nguyen v. Ebbtide Fabricators,* 19 BRBS 142 (1986).

The Claimant has established that he is unable to return to his pre-injury employment as a doorway man. Claimant testified credibly that the position is of a physically demanding, heavy-duty, nature. (Tr. at 31-32.) The record reflects that all of the physicians in this case have testified that Claimant is able to work at most a medium or light duty position. (CX 9; CX 25 at 20-21, 24; EX 2 at 13, 18, 25; EX 3 at 8-9; EX 4; EX 20; EX 35 at 20-21, 24.) Furthermore, Employer implicitly conceded that Claimant is unable to return to work in a heavy duty capacity when it stated that Claimant is capable of light to medium level work. (Tr. at 10.) Therefore, I find that Claimant is unable to return to his pre-injury employment as a doorway man.

The employer meets the burden of establishing suitable alternate employment by identifying specific jobs in the local community that are available to the claimant. *Armfield v. Shell Offshore, Inc.,* 30 BRBS 122, 123 (1996). The employer also must show that the claimant could perform such jobs given his age, education, work experience, and physical restrictions. *Edwards v. Director,* OWCP, 99 F.2d 1374 (9th Cir. 1993); *cert. denied,* 511 U.S. 1031 (1994). The fact finder is to determine the claimant's restrictions based on the medical evidence and decide whether the claimant is capable of performing the jobs identified by the employer. *Villasenor v. Marine Maintenance Indus.,* 17 BRBS 99 (1985). The employer must show that the job opportunities are realistic and does so by establishing the nature, availability and terms of the employment. *Thompson v. Lockheed Shipbuilding & Constr. Co.,* 21 BRBS 94, 97 (1988). If the employer meets this burden the claimant must then prove that he has made a diligent attempt to secure employment. *Palombo v. Director,* OWCP, 937 F.2d 70; 25 BRBS 1 (CRT) (2nd Cir. 1991). If the claimant demonstrates he diligently tried to obtain employment but that his efforts to had been futile, the employer does not meet his burden. *Rieche v. Tracor Marine,* 16 BRBS 272, 274 (1984).

To establish he was unable to perform the jobs offered by Employer, Claimant relies on the medical opinion of Dr. Roy Lefkoe. Dr. Lefkoe opined that Claimant would be unable to return to his employment unless a truly light duty position was made available. He also opined that Claimant is physically unable to perform the top pick operator position that the Employer selected for him, based on the restrictions set forth by him. The doctor based his opinion on the disability report job description, his own experience dealing with longshoreman,[19] Claimant's description, and the video demonstration of the top pick operator position. (CX 25 at 52-53, 58, 73; EX 35 at 52-53, 58, 73.) As Claimant's treating physician since June 24, 2004, Dr. Lefkoe's opinion should be given great weight. I accept Dr. Lefkoe's permanent light duty restrictions placed on Claimant and find these restrictions preclude Claimant from performing the job positions Employer made available.

Employer argues that the video demonstration depicting the duties of a top pick operator fall within the restrictions set forth by Dr. Lefkoe. (EB at 29-32.) However, I find what the video does not show to be more persuasive. I find the Claimant's description of the job duties, previously noted under "Claimant's testimony", to be credible. He has been a longshoreman for 20 years, during which time he has had experience with a top pick machine and is familiar with the requirements of performing that job. Although Employer relies on testimony from Mr. Burleson that operating the machine requires little physical exertion, (EB at 20-21), I find that Mr. Burleson's description of operating a top pick machine remains consistent with Claimant's description.

Both Mr. Burleson and Claimant have explained that a person operating the machine will have to bend his head up and down in order to stack a third container, which is the normal practice. Claimant explained that the video does not show the operators twisting and looking over their shoulder when they reverse because they rely solely on the use of mirrors. However, Mr. Burleson explained that it is prudent to look over your shoulder when reversing as a safety

[19] Dr. Lefkoe has been treating Longshoreman since 1977 for various injuries and is familiar with the top pick operator position. (CX 21 at 12, 52; EX 35 at 12, 52.)

precaution. Dr. Lefkoe's testimony indicates that twisting to look over your shoulder while operating the machine is likely to exacerbate Claimant's injury. In addition, the video does not show the operator using the left and right hands simultaneously; however Claimant testified credibly that operating this machine involves simultaneously controlling the levers with the right hand while steering with the left hand. Dr. Lefkoe's testimony establishes that he would not release Claimant to a position that requires such reaching. (CX 25 at 90-91; EX 35 at 90-91.)

The video also did not demonstrate climbing in and out of the machine. But Dr. Lefkoe opined that climbing in and out of the machine may cause Claimant injury unless he was cautious and proceeded slowly and did so only a few times each day. However, Claimant credibly testified that this position involves climbing up and down the stairs frequently. Furthermore, Mr. Burleson also testified that in an average working day, Claimant would be sitting for approximately five and one-half hours operating the top pick machine. But Dr. Lefkoe explained that Claimant should only sit for up to four hours if he's allowed to change positions. Dr. Lefkoe opined that he would not clear Claimant for any position that required those physical exertions because it would be inconsistent with his restrictions and most likely result in more pain and injury for Claimant.

Employer also relies on Mr. Burleson's opinion that many of the physical difficulties of operating the machine are reduced because of the new features available on a top pick machine. (EB at 20.) I find this irrelevant since Claimant's testimony credibly establishes that even with those new features he could still not perform this position. For example, even with the new machine Claimant would be required to climb the stairs frequently and would still have to sit for over four hours without a change of position. Dr. Lefkoe admitted that having a hand control instead of several levers would minimize having to use both arms simultaneously; however Mr. Burleson testified that when operating the top pick machine the right hand should remain on the joystick except when driving from one point to another. Although the new features may eliminate certain problems, Dr. Lefkoe testified that considering all of the factors involved he would still not release Claimant to work as a top pick operator. (CX 25 at 90-91, 93-94, 103; EX 35 at 90-91, 93-94, 103.) I find Dr. Lefkoe's opinion, that this position does not fall within his light duty medical restrictions, to be sound, well reasoned, and creditable.

Employer, on the other hand, relies on the opinions of Drs. Vacarro and Mandel. Dr. Vacarro opined that Claimant was ready to return to work in a light duty capacity as of December 9, 2003. His opinion was based on the restrictions that he set forth on November 23, 2003. He set those restrictions over one year before the restrictions placed by Dr. Lefkoe. Furthermore, Dr. Vacarro has not been Claimant's treating physician nor evaluated him in any capacity since March 9, 2004. Thus, Dr. Lefkoe is in a better position to opine on Claimant's conditions and limitations at the time he returned to work as well as currently. He has continuously evaluated Claimant approximately once a month for over two years and has documented changes in his condition and restrictions during that time. Therefore I accord less weight to Dr. Vacarro's opinion than Dr. Lefkoe's.

Dr. Mandel opined that operating a top pick machine was consistent with the restrictions he set forth on November 10, 2004. However, he admitted that "there is an inconsistency" with the job requirements and his restrictions. He attempts to explain that despite the inconsistency

Claimant could still operate the top pick machine because his restrictions may have been inaccurate. (EX 2 at 87.) Therefore, I find little weight should be given to Dr. Mandel's opinion set forth at that time. It is important to note that Dr. Mandel's initial opinion was that Claimant was physically incapable of operating a top pick machine. His opinion was only modified after viewing the video demonstration, which I have found insufficient to prove Claimant is capable of performing that work. When relying on Claimant's description of the top pick position, which I find sufficient, Dr. Mandel testified that the position would not be consistent with Claimant's abilities. In addition, Dr. Mandel's opinion should be afforded less weight because he was never a treating physician. Thus, I do not credit Dr. Mandel's opinion that Claimant was physically able, based on the restrictions set forth by him, to operate a top pick machine.

Employer next argues that Claimant is capable of returning to work as a top pick operator because he is able to drive a motor vehicle. (EB at 8-10, 16, 22-23.) This does not establish a capacity to perform under the limitations established by Dr. Lefkoe, his treating physician. Dr. Lefkoe's testimony indicates that he cleared Claimant to drive a motor vehicle, but that his restrictions were placed on operating an industrial high powered machine instead. Therefore, I find the fact that Claimant is able to drive a motor vehicle irrelevant. Employer also argues that he is capable to work as a top pick operator because he can climb his stairs at home. (EB at 12.) However, Dr. Lefkoe opined that occasionally climbing stairs at home would be consistent with his restrictions whereas he would only be able to climb the stairs on the top pick operator if he did so carefully and slowly less than four or five times each day.

In addition, Employer relies on reports submitted by physical therapists Thomas Cantwell and Deborah Shore. They both opined that Claimant is capable of meeting the job demands of the top pick operator position. Mr. Cantwell based his opinion on the restrictions provided by Dr. Vacarro on November 3, 2003 and the video demonstration, which I have hereinbefore discredited. In addition, Dr. Cantwell indicated in his report that he has not considered any updated medical reports since the evaluation performed on November 3, 2003. Therefore, his opinion should be given little weight. In addition, Ms. Shore does not indicate in her report that she relied on any medical restrictions in forming her opinion, instead comparing the top pick job description and Claimant's testimony. Therefore, this opinion should be given little weight as well.

Employer further argues that Claimant's attempt to return to work was staged for failure. (EB at 39.) I find this argument unpersuasive since all of the physicians testified that Claimant has been cooperative, motivated, and eager to return to work throughout treatment and evaluation. I find that Employer has not made available a light duty position that fits within the medical restrictions placed by Dr. Lefkoe. The Employer asserts that it provided Claimant with an open offer that he could work "any position that he wanted," (EX 28 at 61); however the only two positions affirmatively discussed and expressly offered were the top pick operator position and the yard horse position. Based on Claimant's description of the yard horse operator position and Mr. Burleson's testimony that it was more physically exerting than the top pick operator position, I find that it is also inconsistent with Claimant's medical restrictions set forth by Dr. Lefkoe. Since the only two positions expressly offered by the Employer for Claimant to return to work are inconsistent with his light duty physical restrictions, I find that Claimant is unable to return to either of these jobs offered by Employer.

Dr. Lefkoe is an a better position to assess the nature and extent of Claimant's disability and limitation than another physician who has seen or evaluated Claimant on only a few occasions or a physician who has not evaluated Claimant for over two years. Since I credit the opinion of Dr. Lefkoe more than those of Drs. Vaccarro and Mandel, I am compelled to find Employer has failed to establish that the jobs offered at his place of employment constituted suitable alternative employment and the burden remains on Employer to establish the existence of other suitable alternate employment.

Claimant met with vocational expert Dr. Chaiken and was provided with a list of available positions. These recommendations were based on an evaluation of Claimant and involved little to no physical demands. I find that Claimant diligently pursued these recommendations and encountered no success. He applied for six available positions and did not receive any job offers. Employer argues that Claimant's efforts to participate in the placement process with Dr. Chaiken were questionable. (EB at 35.) Employer provided a supplemental report prepared by Ms. Mocarski on October 11, 2006 in which she opined that Claimant did not comply with the vocational process because he submitted a copy of his medical restrictions with each application. She further explains that this activity is viewed as "sabotage" and must have been done without Dr. Chaiken's knowledge. In addition, she speculated that had Dr. Chaiken known about this conduct he would have advised against doing so. (EX 43.) However, I find this argument has no merit as Claimant credibly testified that he included the checklist with each application at the direction of Dr. Chaiken. In addition, Claimant's motivation regarding his job search is established by the record.[20]

Employer's vocational expert, Sonya Mocarski, identified twelve additional earning opportunities, which were available during various periods of time during the relevant disability period, beginning March 14, 2004. She reviewed medical records from Dr. Vacarro, Dr. Mandel, and Dr. Lefkoe and concluded Claimant was able to perform duties consistent with working in the positions she provided. Although her reports indicate that she considered Dr. Lefkoe's medical reports in her assessment, it is clear that Ms. Mocarski used Dr. Vacarro's and Dr. Mandel's functional capacity restrictions rather than that of Dr. Lefkoe's. In her report dated June 22, 2005 she admitted that her findings are not based on the permanent restrictions set by Dr. Lefkoe because they were "not outlined in any of the medical records" she reviewed. (EX 6.)

As the factfinder, I am charged with the duty of determining Claimant's physical restrictions, based on the medical evidence of record, and deciding whether Claimant is capable of performing each of these twelve positions. After comparing the available job positions in Ms. Mocarksi's report with the functional capacity restrictions provided by Dr. Lefkoe, I find that Claimant would be able to perform some of those positions. Ms. Mocarski identified six positions as a fork lift driver. (EX 6.) Dr. Lefkoe testified that the medical restrictions placed on Claimant, which remain in place permanently, include the inability to operate a fork lift. (CX 10; CX 25 at 28; EX 21; EX 35 at 28.) Accordingly, I find those six positions do not fall within Claimant's functional capacity restrictions. In addition, Ms. Mocarski identified a position as a

[20] Dr. Chaiken noted that Claimant was fully cooperative throughout the placement process. (CX 31.) In addition, both Dr. Vacarro and Dr. Lefkoe testified that Claimant remained motivated to return to work throughout treatment. (EX 3 at 20-21; EX 35 at 142.)

crane operator. (EX 6.) I find that Claimant is unable to perform this position since he does not have the skills needed and would require additional training to become a crane operator. (CX 26 at 50-53; EX 28 at 50-53; Tr. at 63-64.) Ms. Mocarski also identified a position operating a top loader or back hoe. I find this position similar to the top pick operator position, therefore inconsistent with Claimant's functional capacity.

Ms. Mocarksi identified four additional positions including an Order Selector for the Delaware Valley Wholesale Florist, an Order Filler for Amerisource Bergen, a Para Transit Driver for Laidlaw Transit Services, and a Driver/Messenger for CD & L Park Avenue. (EX 6.) These remaining positions identified are of a light nature and clearly within Claimant's capabilities. In addition, Claimant admitted that there is some light duty work that he could perform. (Tr. at 8, 131.) Thus, I find Claimant to be capable of performing each of those four positions, the first available on April 10, 2005.

An administrative law judge may consider many factors when deciding the dollar amount of a claimant's loss of wage earning capacity, including the claimant's physical condition, age, education, work history, and alternate employment opportunities identified by the employer. *Abbott v. Louisiana Ins. Guaranty Ass'n,* 27 BRBS 192. Based on the above factors, Employer has established that suitable alternate employment was available to Claimant as of April 10, 2005, in which Claimant could have earned an average of $12.00 per hour, equal to $23,040.00 per year. I find this to be a fair representation of Claimant's present wage earning capacity, based on his age, education, and prior work history. Therefore, I find that Claimant was totally disabled prior to April 10, 2005 and partially disabled after that date.

It is next necessary to determine the nature of the claimant's injury. An injured employee's impairment may be found to have changed from temporary to permanent when the employee's condition reaches the point of MMI. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989). A claimant is permanently disabled if after reaching MMI, he has a residual disability. *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994). The date that MMI is reached is to be determined by medical factors without regard to a claimant's economic situation. *Id.* Thus, the medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985). An inquiry is to be made as to whether treatment received after the proposed date of MMI continued to be curative or had become palliative. *Leech v. Service Engineering Co.*, 15 BRBS 18, 21(1982). Where the medical evidence indicates that the injured worker's condition is improving and the treating physician anticipates further improvement in the future, it is unreasonable for a judge to find that MMI has been reached. *Dixon v. John J. McMullen & Assoc.*, 19 BRBS 243, 245 (1986).

All of the medical experts have concluded that Claimant has reached MMI and his condition will only be maintained without a likelihood of improvement. Dr. Frank determined that Claimant had reached MMI as of April 28, 2004. (CX 9; EX 20.) The record reflects that Claimant's treating physician, Dr. Lefkoe, adopted Dr. Frank's assessment that Claimant had reached MMI. Furthermore, Dr. Mandel also agreed with Dr. Frank's assessment. I find that

Claimant had reached MMI as of April 28, 2004, thus Claimant is entitled to permanent disability as of that date.

2. Medical Benefits pursuant to Section 7(a) of the Act.

An employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130 (1978). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Dean v. Marine Terminals Corp.,* 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. *Bulone v. Universal Terminal and Stevedore Corp.,* 8 BRBS 515 (1978). However, once a claimant has freely chosen a treating physician, he is authorized to change physicians only with the consent of the employer, the carrier, or the District Director. 33 U.S.C. §907(c)(2). If no authorization is sought, generally the employer will not be held liable for the payment of medical benefits. *Slattery Assocs. v. Lloyd,* 725 F.2d 780, 787, 16 BRBS 44, 53 (CRT) (D.C. Cir. 1984).

Claimant argues that Employer is responsible for the payment of medical benefits incurred as a result of treatment rendered by Dr. Lefkoe. (CB at 7.) In return, Employer argues that it is not responsible for the medical benefits related to treatment rendered by Dr. Lefkoe because he was not an authorized physician by Employer. (EB at 41-42.) Employer has not put forth any evidence to support this argument. I note that Dr. Lefkoe was the first and only physician selected by Claimant. All other physicians were selected and referred to Claimant by Employer through Louise Kaplan. In addition, Dr. Lefkoe opined, as his treating physician, that continuous treatment of his condition is medically necessary to control his pain. I adopt this conclusion. Since Claimant may be treated by the physician of his choice, he is entitled to receive compensation for those medical benefits incurred through his treatment with Dr. Lefkoe.

ATTORNEY'S FEE

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer. Claimant's attorney has not submitted his fee application. Within fourteen days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Employer's counsel, who shall then have ten days to comment thereon. The postmark shall determine the timeliness of any filing. I will consider only those legal services rendered after the date of referral to this office. Services performed prior to that date should be submitted to the District Director for his consideration.

ORDER

It is hereby ORDERED:

(1) Employer shall pay Claimant temporary total disability benefits from May 20, 2003 through April 27, 2004, based on an average weekly wage of $1,715. 30.

(2) Employer shall pay Claimant permanent total disability benefits from April 28, 2004, the date of maximum medical improvement, through April 09, 2005, based on an average weekly wage of $1,715.30.

(3) Employer shall pay Claimant permanent partial disability benefits from April 10, 2005 through the present and continuing, with a wage earning capacity of $23,040.00, based on an average weekly wage of $1,715.30.

(4) Employer shall pay medical expenses incurred by Claimant for treatment, including treatment rendered by Dr. Roy Lefkoe, pursuant to Section 7 of the Act.

(5) Employer is entitled to a credit for any compensation previously paid.

(6) Employer is to pay Claimant's attorney's fees and costs established by a supplemental order.

A

RALPH A. ROMANO
Administrative Law Judge

Cherry Hill, New Jersey